EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

GENERAL COUNSEL

May 2, 2003

Mr. Frank Trinity
General Counsel
Corporation for National and Community Service
1201 New York Avenue, NW
Washington, D.C. 20525

Dear Mr. Trinity:

You have requested that we review an opinion issued by the General Accounting Office (GAO) on April 9, 2003, concerning when, and in what amount, the Corporation for National and Community Service (the Corporation or CNCS) should record its education awards as obligations. The Corporation and GAO disagree on both (i) when the Corporation must record such obligations and (ii) the amounts it must record.

It is not surprising that GAO and the Corporation have interpreted the relevant provisions of the underlying statute differently. The statute is certainly not a model of clarity. The difficulty arises in part due to the structure of this program, which involves grant agreements being entered into between the Corporation and the States and other recipients, which are then followed at some later time by individuals enrolling as volunteers with the grantees (on either a full-time or part-time basis), and which is then followed by the volunteers' actual service. It is through this service that a volunteer actually earns an educational award, the value of which depends on how long the volunteer actually serves.

After scrutinizing the most relevant statutory provisions (including 42 U.S.C. §§ 12571(c), 12581(f), and 12603), we believe that GAO's view regarding the appropriate time for recording education awards as obligations may be somewhat more consistent with the language of the statute, but this point is not particularly relevant given the structure of appropriations for the National Service Trust (the Trust). More importantly, we do not believe that GAO is correct regarding the amounts that the Corporation must record as obligations.

When Must the Corporation Record an Education Award as an Obligation?

GAO concluded that the Corporation must record an obligation at the time the Corporation signs a grant agreement. In contrast, the Corporation believes that it need not record the obligation until the later point in time when an individual actually enrolls in the Trust.

Our sense is that GAO's view is somewhat closer to our reading of the statute. The Corporation's authority to make grants to States and other recipients is set forth in 42 U.S.C. § 12571. That section includes the following provision:

(a) Provision of assistance

. . . [T]he Corporation for National and Community Service may make grants to States, subdivisions of States, Indian tribes, public or private nonprofit organizations, and institutions of higher education for the purpose of assisting the recipients of the grants . . . to carry out full- or part-time national service programs . . . .

(c) Provision of approved national service positions

As part of the provision of assistance under [this section], the Corporation shall –

(1) approve the provision of national service educational awards . . . for the participants who serve in national service programs carried out using such assistance; and

(2) deposit in the National Service Trust . . . an amount equal to the product of –

(A) the value of a national service educational award under [42 USCS § 12603]; and

(B) the total number of approved national service positions to be provided.

Id. (emphasis added).

Under this provision, funds must be deposited in the Trust for "approved national service positions to be provided." Id. (emphasis added). Thus, deposit must occur at a time when positions are "approved" but not yet "provided" – i.e., at a time when a grant recipient has authority to fill a position, but has not yet done so. Another provision of the statute, 42 U.S.C. § 12581(f), similarly requires that "[t]he Corporation may not approve positions as approved national service positions . . . for a fiscal year in excess of the number of such positions for which the Corporation has sufficient available funds in the National Service Trust for that fiscal year." Because these sections specify when "sufficient available funds" must be set aside for education awards through "deposit" in the Trust, they should be read as instructing the Corporation to obligate funds when it "approves" positions, as opposed to the later date when a grant recipient fills those positions.[1]

The question is then whether "approval" of positions coincides with the date of a grant, or during some subsequent "part of the provision of assistance" to grantees under Section 12571. We think the best reading of these provisions is that the Corporation "approves" positions at the point when a grant recipient has authority to fill those positions. That point will turn, of course, on what the grant actually permits a recipient to do. If, for example, a grant recipient must still obtain a later approval from the Corporation before enrolling people in any positions under the grant, the date of that later approval may properly qualify as the date of "approval" for purposes of sections 12571 and 12581.

[1] This is the better and more conservative point of obligation in light of both the unique statutory provisions requiring deposit of sufficient funds in the Trust and the history of this program and its recording of obligations.

In light of the structure of Congress' appropriations, however, the date on which funds are to be transferred to the Trust does not appear to have practical significance for present purposes. In the FY03 appropriation, for example, Congress appropriated $100 million specifically for the Trust. Thus, the Corporation did not independently determine how much of the appropriation needed to be placed in the Trust to support educational awards for program participants. Because the amount of funds Congress decides to place in the Trust now drives the grant-making process (and not vice-versa), the important question for present purposes is not the time at which obligations are incurred, but the amount of those obligations.

In What Amount Must the Corporation Record the Obligation?

With respect to the question of how much the Corporation needs to obligate for an education award, GAO concludes that the Corporation must record (at the signing of the grant agreement) the maximum amount that could conceivably be earned and later used for educational awards. By contrast, the Corporation believes that it may record a conservative estimate of the amount of funds the Corporation will actually have to pay for the awards that are earned and used. Historical experience and the Corporation's modeling have shown that the extent to which education awards are actually earned and used is significantly lower than the theoretical maximum. Trust data indicates that not all enrollees earn (through their service) the maximum award to which they could become entitled, and not all enrollees use the award that they earned. Thus, recording obligations based on reasonable and conservative estimations that reflect historical experience instead of basing the obligation on theoretical maximums would permit the Corporation to authorize more individuals to perform volunteer service for their communities ensuring that the Corporation has obligated sufficient amounts to cover the payments that the Federal government will ultimately have to make, in future years, when these volunteers use these awards to support their education.

Having reviewed the GAO and CNCS opinions in light of the governing statue, we conclude that GAO's position is not consistent with the statutory language at issue. Section 12571(c) requires the Corporation to deposit into the Trust "an amount equal to the product of (A) the value of a national service educational award under section 12603 of this title; and (B) the total number of approved national service positions to be provided." Significantly, there is no single "value" of an award under Section 12603. Instead, Section 12603 specifies that different values apply depending on whether a person is a full- or part-time participant, and on whether the person completes his or her term of service and (if the service is not completed) whether the person receives a pro-rated award. Thus, in determining "the value" for Section 12571(c), the Corporation must necessarily rely on robust estimates, based on historical experience, of the extent to which volunteers complete their service and, when service is not completed, the extent to which they receive pro-rated awards. According to the Corporation, the value of an educational award for any particular enrollee can therefore range anywhere between $0 and $4,725, depending on these variables.

This conclusion is buttressed by 42 U.S.C. 12581(f), which expressly contemplates that the Corporation may not have sufficient funds in the Trust to cover its educational awards: "If appropriations are insufficient to provide the maximum allowable national service educational awards under division D of this subchapter for all eligible participants, the Corporation is

authorized to make necessary and reasonable adjustments to program rules." Of course, the Trust could only have a shortfall if the Corporation mistakenly estimated the appropriate amount to deposit. Thus, section 12581(f), like section 12571(c), contemplates that the Corporation will estimate the amounts it needs to place in the fund, and may occasionally under-estimate those amounts.

There are two important caveats, however. First, the statute authorizes estimation only of the value of awards that will be earned. It does not authorize estimation of the percentage of those earned awards that will actually be used. To the contrary, as noted above, Section 12571(c) requires the Corporation to deposit into the Trust "an amount equal to the product of (A) the value of a national service educational award under section 12603 of this title; and (B) the total number of approved national service positions to be provided. By referring to the "total number" of approved positions, as opposed to the number of participants that actually use their awards, the statute does not authorize estimation of the extent to which earned awards will actually be used.[2]

Second, the Corporation must ensure that its estimates are conservative ones, designed to err on the side of overfunding the Trust. Section 12581(f) requires the Corporation to "tak[e] into consideration funding needs for national service educational awards . . . based on completed service." By requiring the Corporation to "take into consideration" the "funding needs" that exist "based on completed service," Congress expressly authorized the Corporation to assess its actual "needs," but also placed a thumb on the scales by specifying that the Corporation should at least consider "completed service." See generally Bennett v. Spear, 520 U.S. 154, 172 (1997) (noting that while agency's final decision is within its discretion, it must comply with procedural requirement to "take into consideration" specific factors). Thus, the Corporation should err on the side of caution.

Such estimation is consistent with the obligation practices of other agencies that use estimation methodologies to determine the amount of funds to be obligated. One obvious example involves federal loan guarantees, and the "subsidy" amount that an agency has to obligate under the Federal Credit Reform Act. These subsidy calculations are based on historical experience and reasonable estimates of the government's ultimate legal liability, based on such variables as default rates.

Another analogous example is the Montgomery GI Bill, which provides education benefits for those in the military reserves. Under 10 U.S.C. § 2006, the Defense Department uses a model to estimate the numbers of likely beneficiaries and the present value of future benefits, in determining the amounts that are obligated for future benefit payments.

Government contracts provide another example. While GAO notes that agencies may terminate government contracts for convenience, each agency is required to obligate and set aside an amount equal to its potential termination liability at the time it enters into a contract.

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[2] The Corporation has suggested to us that, in recent years, it informed congressional committees of the Corporation's reliance on usage rates in preparing the Corporation's budget estimates, and that Congress relied on usage rates when it rescinded Trust balances. The statute, however, does not give the Corporation authority to rely on usage rates for determining the amount that needs to be obligated.

Significantly, the agency must estimate that amount, because the contractor's termination costs necessarily vary throughout the term of a contract.

In addition, Congress has affirmatively disapproved efforts not to estimate. In the case of HUD's tenant-based Section 8 rental subsidies program, the Department's practice had been to obligate well in excess of reasonable estimates of amounts likely to be used. For example, HUD's practice was to fund all rental subsidies as if they were occupied every day of the year, without any vacancies or turnover in subsidy holders. Congress reacted this year by directing HUD to obligate lesser amounts, based on current estimates of actual usage. *See* Division K, Consolidated Appropriations Resolution, 2003, "Public and Indian Housing, Housing Certificate Fund" (117 Stat. 483-84).[3]

Finally, GAO's conclusion that no estimation is permissible would not only depart from this general administrative practice and the statutory text, it would also produce unreasonable results. The Corporation's practice of relying on its "best estimate" of its ultimate legal liability achieves two important goals: (1) setting aside sufficient obligated funds to cover its ultimate legal liabilities, and (2) maximizing the number of positions that the Corporation can support with its appropriations – in other words, the number of individuals who can perform volunteer service for their communities under this program. By contrast, GAO's approach of requiring the Corporation to obligate the maximum conceivable amount of its ultimate legal liability furthers only the first goal of avoiding a deficiency, while requiring the Corporation to tie up a significant portion of its budget by setting funds aside for theoretical liabilities that will never come due.

We do not believe that Congress intended such a result – especially since the FY03 appropriations bill specifically authorized the Corporation enroll up to 50,000 new volunteers. See H.J. Res. 2-496; Conference Report for FY03 Omnibus Appropriations Act (H. Rep. No. 108-10), at 1432 ("This funding level provided will support 50,000 new volunteers enrolled in the Trust in fiscal year 2003."). Based on information that the Corporation has provided to us, the Corporation could not enroll anywhere near 50,000 volunteers in FY 03 if it used GAO's approach of obligating the maximum theoretical amount for educational awards. Thus, GAO's approach fails to give due regard to the statutory texts and the administrative practice described above, and is inconsistent with Congress' recently expressed intent to give the Corporation an opportunity to enroll 50,000 members this year.

Sincerely,

Philip J. Perry
General Counsel

[3] Estimation also promotes accurate recording of obligations. When Congress enacted 31 U.S.C. 1501 to prescribe criteria for recording obligations, it was concerned not only that obligations should be timely recorded, but also that obligations should not be prematurely recorded or over-recorded. See H.R. Rep. No. 2266, 83d Cong., 2d Sess. 48-49 (1954). Recording unrealistically large amounts "make[s] it next to impossible for [Congress] to determine with any degree of accuracy the amount which has been obligated against outstanding appropriations as a basis for determining future requirements." Id. Thus, GAO itself has recognized that "where the precise amount is not known at the time the obligation is incurred, the obligation should be recorded on the basis of the agency's best estimate." GAO, Principles of Federal Appropriations Law 6-4 (1st ed. June 1982).